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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF NEVADA**

DENNIS MONTGOMERY, an individual; and
MONTGOMERY FAMILY TRUST, a California
Trust,

Plaintiffs,

vs.

ETREPPID TECHNOLOGIES, L.L.C., a Nevada
Limited Liability Company; WARREN TREPP,
an individual; DEPARTMENT OF DEFENSE of
the UNITED STATES OF AMERICA; and
DOES 1 through 10,

Defendants.

AND RELATED CASE(S)

Case No. 3:06-CV-00056-PMP-VPC
Base File

3:06-CV-00145-PMP-VPC

**ETREPPID TECHNOLOGIES, L.L.C.'S
AND WARREN TREPP'S MOTION
FOR SANCTIONS FOR FAILURE TO
COMPLY WITH MAY 21, 2008 ORDER**

eTreppid Technologies, L.L.C. and Warren Trepp (hereinafter referred to collectively as
"eTreppid") hereby file their Motion for Sanctions for Failure to Comply with May 21, 2008 Order.
This Motion is supported by the following points and authorities, and all papers and pleadings filed
herein.

1 **I. INTRODUCTION**

2 On four occasions, this Court has ordered Plaintiffs (collectively, "Montgomery") to produce
3 documents in response to eTreppid's discovery requests. Most recently, on May 21, 2008, this Court
4 ordered Montgomery to produce documents responsive to a number of eTreppid's discovery requests
5 no later than Friday, May 23, 2008, or in the event that responsive documents were in the possession
6 of Opspring, LLC, Monday, May 26, 2008. Montgomery has, in large part, once again disregarded
7 this Court's orders requiring him to produce these documents. Although Montgomery has provided
8 approximately 350 pages of hard copy documents and one unreadable hard drive in response to this
9 Court's order, he has failed to provide a number of documents that this Court specifically ordered him
10 to provide.

11 Most surprisingly, Montgomery has failed to provide a copy of the Len Glogauer email, which
12 he previously provided to the *Wall Street Journal*. Montgomery has been aware, for several months,
13 that eTreppid vigorously contests the authenticity of this document. Montgomery has been aware – for
14 several months – that this Court ordered him to provide this email. Indeed, the Court has specifically
15 questioned Montgomery's counsel as to the location of this email. Nonetheless, instead of providing a
16 native format copy of this email, Montgomery's counsel now asserts that "the hard drive with the
17 Glogauer email on it is not in Montgomery's possession." Counsel for Montgomery further stated that
18 Montgomery would advise, on Tuesday, May 27, as to when this email would be provided. As of the
19 time of filing this pleading, Montgomery has not advised eTreppid of any such arrangements. The bad
20 faith shown by Montgomery's refusal to provide this document, even after he was specifically ordered
21 to do so, is astonishing.

22 Montgomery was first ordered to produce these documents on February 21, 2008, more than
23 three months ago. His abject refusal to comply with a series of court orders requiring the production
24 of these documents is not excusable, and at this point can only be viewed as intentional. Accordingly,
25 eTreppid requests that this Court sanction Montgomery for his non-compliance with Court orders by
26 (1) striking Montgomery's complaint in this matter, (2) striking Montgomery's response to eTreppid's
27 counterclaim, and (3) awarding eTreppid's costs in bringing the present motion.
28

1 **II. STATEMENT OF FACTS**

2 On February 21, 2008, this Court granted eTreppid's Motion to Compel, and ordered
3 Montgomery to provide a number of documents in response to eTreppid's requests for production by
4 March 14, 2008. Montgomery refused to provide the subject documents, and instead filed an objection
5 to this Court's February 21, 2008 Order and a motion to stay that Order. On March 19, 2008, this
6 Court affirmed its February 21, 2008 Order. However, Montgomery did not comply and continued to
7 refuse to produce most of the subject documents. eTreppid subsequently filed a motion for sanctions.
8 On May 7, 2008, this Court entered an order granting in part eTreppid's motion for sanctions, and
9 ordered Montgomery to produce the following documents on or before May 19, 2008:

- 10 • "Documents relating to eTreppid's technology, including white papers, power point
11 presentations, marketing documents, and correspondence with potential customers;"
- 12 • "Documents relating to any attempt by the Montgomery parties to license, sell, or
13 distribute any technology in the fields of data compression, pattern recognition, object
14 tracking, or anomaly detection between January 18, 2006 and the present;"
- 15 • "Documents that the Montgomery parties provided to the *Wall Street Journal*, as well
16 as any other reporters or media organizations, which discuss or refer to Mr. Trepp,
17 eTreppid, or Jim Gibbons;"
- 18 • "Photocopies of the faces of *all* CDs seized during the FBI's March 2006 search of the
19 Montgomery residence and storage units and a copy of any CD seized by the FBI and
20 marked as an 'eTreppid CD.'" (emphasis added).

21 May 7, 2008 Order (Document 582) at p. 6:1-12.

22 Montgomery again failed to produce documents responsive to this Order, and instead filed an
23 "Emergency Motion" requesting a hearing regarding Montgomery's attempts to produce documents in
24 a manner complying with the United States Protective Order. On May 21, 2008, this Court heard
25 Montgomery's Emergency Motion. At the conclusion of this hearing, the Court ordered as follows:

26 2) Mr. Montgomery shall comply with this Court's May 7, 2008
27 order (#582) and produce documents described more fully on page 6, lines
28 1-12 (item numbers 1-4) no later than **Friday, May 23, 2008**; however, to
the extent Mr. Montgomery has a good faith belief that documents
responsive to this request may be subject to the United States protective
order, production is deferred until after Mr. Montgomery's meeting with

Government officials next week.

3) Ms. Klar, counsel for the Montgomery Parties, advises the Court that she is awaiting production of certain responsive documents from Opspring, LLC; therefore, production of these documents is deferred until **Monday, May 26, 2008**; and

4) Mr. Montgomery shall provide the [Len] Glogauer emails as part of this document production no later than **Friday, May 23, 2008**, and these documents shall be produced in PST or native format.

Since the Court entered this Order, Montgomery has produced a total of 350 pages of paper documents, and a hard drive which was not readable. Montgomery asserts that the hard drive contains documents relating to eTreppid's technology which were created prior to December 31, 2002. Attached hereto as **Exhibits 1-6** is a series of letters and emails enclosing these documents.

Despite the fact that Montgomery has produced some additional documents, his most recent attempts to provide responsive documents fall far short of what this Court required.

Montgomery Has Failed to Provide Documents Relating to eTreppid's Technology

Montgomery has not yet provided any documents responsive to eTreppid's request for "documents relating to eTreppid's technology, including white papers, power point presentations, marketing documents, and correspondence with potential customers." On Friday, May 23, 2008, Montgomery delivered a hard drive to eTreppid allegedly containing documents created prior to December 31, 2002 which relate to eTreppid's technology. However, this hard drive was not readable. eTreppid advised Montgomery of this fact on Saturday, May 24, 2008.¹ In response, Montgomery acknowledged that "a problem was identified in the other forensic copies of the drive," and agreed to provide a replacement hard drive on Tuesday, May 27, 2008. **Exhibit 4.**

Even if Montgomery had provided a hard drive which was readable, the documents which Montgomery claims exist on that hard drive – i.e., documents created prior to December 31, 2002 – are not a sufficient response to eTreppid's request or this Court's Order. It is simply not credible that Montgomery can have a good faith belief that every document created after December 31, 2002, which relates to eTreppid's technology contains information subject to the United States Protective Order.

¹ As eTreppid has pointed out before, it is ironic that Montgomery is obliged now to provide documents that relate to eTreppid's technology on a hard drive, given that Montgomery previously took the position that he did not take "files or hard drives, or anything from eTreppid."

1 Montgomery worked at eTreppid for seven years, working full time as eTreppid's Chief Technology
2 Officer, responsible for the development of all of eTreppid's technology. Many of these years predate
3 any governmental contracts, and therefore could not contain information subject to the United States
4 Protective Order. Moreover, in the three months since Montgomery was first ordered to produce these
5 documents, he has apparently made no attempt to segregate responsive documents that may be subject
6 to the United States Protective Order. Instead, notwithstanding clear direction from the Court,
7 Montgomery implicitly makes the broad assertion that any document created after December 31, 2002
8 could contain classified information, and on that basis, he has refused to comply with the Court's most
9 recent May 21, 2008 Order, and has once again failed to provide such documents. Accordingly,
10 Montgomery has failed to provide documents that are responsive to eTreppid's request and this
11 Court's Order

12 Montgomery Has Failed to Provide All Documents Relating to His Attempts to Market the
13 Subject Technology

14 Montgomery has also failed to provide all documents "relating to any attempt by the
15 Montgomery parties to license, sell, or distribute any technology in the fields of data compression,
16 pattern recognition, object tracking, or anomaly detection between January 18, 2006 and the present."
17 Montgomery has provided some documents relevant to this request, including documents
18 memorializing an employment contract between Opspring and Montgomery through which Opspring
19 agreed to pay Montgomery an annual salary of \$1.2 million and copies of emails exchanged between
20 Montgomery's former counsel, Michael Flynn, and counsel for Opspring. However, Montgomery has
21 not produced any emails or other correspondence between himself, on one hand, and Opspring,
22 Blixseth, Sandoval, or any third party, on the other. In addition, Montgomery has not provided any
23 pay stubs or bank statements which show payments made by these entities to him. These omissions
24 are intentional and strain credibility. It is simply inconceivable that Montgomery entered into a
25 contract through which he was paid \$1.2 million per year without any emails or correspondence being
26 exchanged relating to the nature of Montgomery's skills or the type of technology software that
27 Montgomery was licensing to Opspring. There is no correspondence discussing the market for the
28 subject technology or how Opspring would use the subject technology. There is no correspondence

1 through which Montgomery describes the difference between the technology that he claims as
2 belonging to him and that belonging to eTreppid. It defies all reason to think that Montgomery has
3 produced all documents that this Court ordered him to produce.

4 Moreover, Montgomery's former counsel, Michael Flynn, has stated, in a sworn declaration
5 filed with this Court (Document 547), that Blixseth and Klar are currently engaged in an effort to
6 destroy emails relating to the relationship between Blixseth, Opspring, and Montgomery. April 24,
7 2008 Flynn Declaration at 49:6-23. Accordingly, there are substantial reasons to believe that a large
8 number of emails between Montgomery and these other parties exist, but have not been produced by
9 Montgomery.

10 The reason for Montgomery's refusal to provide these documents is obvious. If produced,
11 these documents will show that Montgomery has violated the preliminary injunction in this matter by
12 selling and attempting to sell the technology at issue in this case to third parties. These
13 communications, which this Court ordered produced, are likely to contain information showing that
14 Montgomery sold the subject technology to Opspring, Sandoval, and/or Blixseth. As such, they are
15 directly relevant to essential issues in this case, and Montgomery's refusal to provide them is highly
16 prejudicial.

17 Montgomery Has Failed to Produce All Documents Provided to the News Media

18 Montgomery has provided 119 pages of documents which he claims constitute documents
19 "relating to communication with the media." **Exhibit 1.** This production simply cannot contain all
20 documents provided to the media.

21 In a November 1, 2006 *Wall Street Journal* story, a true and correct copy of which is attached
22 hereto as **Exhibit 7**, reporter John Wilke refers to a number of documents which Montgomery
23 provided to the *Wall Street Journal*, but which have not been produced. For instance, Wilke cites a
24 letter to Montgomery from a top Air Force Lawyer, a memo from a Gibbons Staff member to an
25 eTreppid executive, an email from eTreppid's "then-lobbyist," and a number of other emails. None of
26 these documents, which could only have come to the *Wall Street Journal* from Montgomery, has been
27 produced.

28 In a February 15, 2007 *Wall Street Journal* story, a true and correct copy of which is attached

hereto as **Exhibit 8**, reporter John Wilke refers specifically to a September 25, 2003 email from Len Glogauer to Warren Trepp. Indeed, this Court ordered Montgomery to produce this email in its native format. However, Montgomery has not produced even a copy of this email. Wilke also refers to a March 22, 2005 email between Jale Trepp and Warren Trepp. Montgomery has not produced a copy of this email. Moreover, Wilke states in this same article that “[t]he eTreppid emails include dozens to and from then Rep. Gibbons.” Montgomery has not produced these “dozens” of emails.

Moreover, in a May 11, 2007 report on MSNBC’s *Countdown with Keith Olbermann*, reporter Lisa Myers states that “Montgomery has provided NBC with hundreds of e-mails, he says, from Trepp’s computer.” A true and correct copy of a transcript of this report, printed from the MSNBC website at <http://www.msnbc.msn.com/id/18659202/>, is attached hereto as **Exhibit 9**. Nonetheless, Montgomery has not produced these “hundreds of e-mails,” as was required by this Court’s Orders of February 21, March 19, May 7, and May 21, 2008.

Astonishingly, Montgomery’s counsel now asserts that Montgomery was unable to provide a native format copy of the Len Glogauer email within the deadline imposed by this Court because “[t]he hard drive with the Glogauer email in native form is not in Mr. Montgomery’s possession.” **Exhibit 10**. Montgomery has long maintained that this email is an essential component of the case, as it shows malfeasance on the part of Trepp in securing government contracts. Nonetheless, he now apparently admits that he has spoliated the subject evidence by failing to maintain a native format copy of this email in his own records.

Montgomery Has Failed to Provide Photocopies of the Faces of CDs Returned by the FBI

As eTreppid has previously shown, the FBI returned 169 CDs to Montgomery. Montgomery was ordered to provide photocopies of the faces of all of these CDs. However, he has so far provided photocopies of the faces of only 58 CDs in total. Montgomery’s counsel now asserts that the faces of the remaining 111 CDs contain information that may be subject to the United States Protective Order. **Exhibit 10**. This contention, made to avoid compliance with this Court’s previous orders, is demonstrably false.

On March 19, 2007, Montgomery filed an Opposition to eTreppid’s Motion for a Temporary Restraining Order. Attached as Exhibit 7 to that Motion was a photograph of a series of CDs which

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1 Montgomery describes, in his March 19, 2007 pleading, as an "FBI Inventory Picture." Opposition to
2 Motion for Temporary Restraining Order at 20:23-27. This FBI inventory picture shows
3 approximately 16 CDs, but only the faces of some are legible. A true and correct copy of this
4 photograph is attached hereto as **Exhibit 11**. These CDs include, *inter alia*, a CD marked "DEO XYZ
5 Data," a CD marked "Warren Old eMail," a CD marked "Voice Messages 12/03-07/04," and a CD
6 marked "eTreppid Technologies, LLC Dennis Backup." Notably, these CDs were in the FBI's
7 possession for several months. The FBI photographed the CDs and has prepared an inventory of these
8 items. At no time has the United States asserted that any information contained on the face of these
9 CDs falls within the scope of the State Secrets privilege.

10 The faces of the CDs depicted in Montgomery's March 19, 2007 pleading clearly do not
11 contain information that is subject to the United States Protective Order; the United States has not
12 redacted any of the information in this exhibit, even though it has been filed publicly for more than one
13 year. Nonetheless, despite being specifically ordered to do so, Montgomery has not provided copies of
14 the faces of these CDs. Obviously, the fact that Montgomery has not provided photocopies of the
15 faces of these particular CDs, which are clearly not subject to the United States Protective Order,
16 strongly suggests that he is acting in bad faith by asserting that 111 CDs that he has not yet produced
17 may contain information that is subject to the United States Protective Order.

18 Incredibly, Montgomery's counsel has specifically stated that Montgomery does not now have
19 possession of one of the CDs that was clearly depicted in Montgomery March 19, 2007 pleading. In
20 an email dated May 24, 2008 (a true and correct copy of which is attached hereto as **Exhibit 12**), Ms.
21 Klar states that "I do not believe that Dennis has the CD marked Warren's Old Email." Montgomery
22 previously asserted that this CD was in the FBI's possession. The 169 CDs that the FBI seized were
23 returned to Montgomery by early April 2007. If this CD is not in Montgomery's possession, then
24 Montgomery has deliberately spoliated significant evidence in this case.

25 Accordingly, the evidence shows that Montgomery has utterly failed to provide a substantial
26 number of documents which he was ordered to produce. Montgomery's failure to provide this
27 information, after being ordered to do so on four separate occasions, is simply outrageous.
28 Accordingly, eTreppid respectfully requests that this Court sanction Montgomery for his failure to

1 provide responsive documents.

2 **III. ARGUMENT**

3 **Montgomery Should Be Subject to Terminating Sanctions**

4 The Ninth Circuit has held that terminating sanctions may be appropriate where a party has
5 acted with “willfulness, bad faith, and fault” in failing to comply with a court order requiring
6 discovery. *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th
7 Cir. 2007). In determining whether terminating sanctions are appropriate, the Court should consider
8 five factors:

- 9
- The public's interest in expeditious resolution of litigation;
 - 10 • The court's need to manage its dockets;
 - 11 • The risk of prejudice to the party seeking sanctions;
 - 12 • The public policy favoring disposition of cases on their merits; and
 - 13 • The availability of less drastic sanctions.

14 *Id.*

15 In the present case, these factors strongly militate in favor of the imposition of terminating
16 sanctions. This case was initiated in January 2006. Since that time, Montgomery has provided
17 virtually no meaningful discovery responses, and has provided only a small handful of non-public
18 documents. Even though the discovery stay was lifted in November 2007, Montgomery still has not
19 produced any of the key documents in this case, even though this Court has ordered him to do so on
20 four occasions. Given this background of deliberate delay in the discovery process, Montgomery’s
21 outright refusal to comply with this Court’s Order of February 21, 2008 is clearly just one more
22 attempt to delay the expeditious resolution of this litigation.

23 The second factor also militates in favor of imposing terminating sanctions on Montgomery.
24 This Court has devoted a tremendous amount of time to this case already. Indeed, Magistrate Cooke
25 has held monthly status conferences to encourage the expeditious resolution of discovery disputes.
26 The February 21, 2008 Order requiring Montgomery to produce documents in response to eTreppid’s
27 discovery demands was issued as a result of one such status conference. By willfully disregarding that
28 order as well as three subsequent orders also requiring Montgomery to produce these documents,

1 Montgomery has demonstrated a certain contempt for the effort that this Court is devoting to the
2 management of this case, as well as the Court's authority over this process. Thus, Montgomery's
3 refusal to comply with this Court's February 21, 2008, March 19, 2008, May 7, 2008, and May 21,
4 2008 Orders undermines this Court's ability to manage its docket.

5 Montgomery's refusal to provide the requested documents causes significant prejudice to
6 eTreppid. Montgomery has simply failed to provide virtually any documents which relate to his and
7 eTreppid's respective claims and defenses. Even though the discovery cutoff in this matter is rapidly
8 approaching, eTreppid has been utterly unable to evaluate the extent to which documents in
9 Montgomery's possession, custody, and control relate to the facts at issue in this case. eTreppid has
10 been unable to prepare to depose relevant witnesses because Montgomery has refused to provide
11 documents needed to prepare for such depositions. In particular, eTreppid has been unable to
12 thoroughly evaluate the following issues because Montgomery has refused to provide the ordered
13 discovery:

- 14 • eTreppid has been unable to conduct discovery as to its claim for misappropriation of
15 trade secrets because Montgomery has refused to provide documents evidencing his
16 communications with his current employers, which may very well support eTreppid's
17 claims.
- 18 • eTreppid has been unable to evaluate Montgomery's claim that he owns the technology
19 at issue because Montgomery has refused to provide not only the source code for the
20 subject technology, but has also failed to provide any other documents in his
21 possession which may describe the subject technology and the basis for Montgomery's
22 alleged ownership.

23 The fourth factor, the policy of deciding cases on their merits, likewise militates in favor of the
24 imposition of terminating sanctions. Montgomery's refusal to participate meaningfully in the
25 discovery process has made resolution of this case on the merits virtually impossible. As set forth
26 above, Montgomery continues to refuse to provide information that is absolutely necessary to the
27 ultimate trial of this matter.

28 Finally, there is no reason to think that a less drastic sanction will have any real effect.

Montgomery has already refused to comply with this Court's four previous orders requiring discovery. Indeed, this Court has already granted eTreppid's request for monetary sanctions, Yet Montgomery has continued to refuse to produce discoverable documents. As a result of those refusals, eTreppid's ability to prepare this case for trial has been significantly hampered. Accordingly, eTreppid respectfully submits that Montgomery's complaint in this matter, as well as his answer to eTreppid's counterclaims, should be stricken and a default judgment should be entered against Montgomery.

In addition, eTreppid requests that it be awarded the costs and attorneys' fees expended in bringing the present motion, in an amount to be determined after the motion has been briefed and argued.

IV. CONCLUSION

For the foregoing reasons, eTreppid respectfully requests that the present motion be granted.

Dated: May 27, 2008.

/s/

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PROOF OF SERVICE

I, Paul D. Cain, declare:

I am employed in the **City of Reno, County of Washoe, State of Nevada**, by the law offices of Hale Lane Peek Dennison and Howard. My business address is: **5441 Kietzke Lane, Second Floor, Reno, Nevada 89511**. I am over the age of 18 years and not a party to this action. I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection of mail, delivery of its hand-deliveries and their process of faxes.

On May 27, 2008, I caused the foregoing **ETREPPID TECHNOLOGIES, L.L.C.'S AND WARREN TREPP'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH MAY 21, 2008 ORDER** to be:

X filed electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document to the following person(s) at the following e-mail addresses:

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct, and that this declaration was executed on May 27, 2008.

3 /s/
4 Paul D. Cain

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